

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
November 17, 2016
Minneapolis, Minnesota
Courtroom 12W
10:00 a.m.

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

And THE HONORABLE WILLIAM H. LEARY III
RAMSEY COUNTY JUDGE

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P R O C E E D I N G S

(10:15 a.m.)

THE COURT: Good morning. Please be seated. All right. We have all of your appearances. We have the joint agenda. I know that you will be back in court at 1:00 this afternoon. I have a thought about the December meeting. How do you -- should we have a conference in December or should we forget it? How about that for hitting you with something that you weren't -- Ms. Zimmerman? They're thinking, they're thinking.

MR. BLACKWELL: Go ahead, Genevieve.

MS. ZIMMERMAN: I think in light of the upcoming discovery cut-off, it may well be worth our time to continue and have a conference if the Court has it scheduled, and if that works for you.

MR. BLACKWELL: And my thought was perhaps we could wait and see a little bit whether we have an issue with respect to the items she brings.

THE COURT: All right. Perfect. Now, it's on the calendar, and I'm ready to go. I just didn't want to make you come in if there was a point.

All right. Well, let's just run through the agenda. Number one is the pretrial order with the amended scheduling order. Is there anything to discuss about that now?

1 MR. BLACKWELL: No, Your Honor.

2 MS. ZIMMERMAN: No, Your Honor.

3 THE COURT: I didn't think so. And then the
4 plaintiff fact sheets. Ms. Zimmerman?

5 MS. ZIMMERMAN: Just briefly for the benefit of
6 those folks that are on the telephone, we have now rolled
7 out an electronic portal where the plaintiff's attorneys
8 will be able to submit the information for the fact sheets
9 online. Those passwords, I think, have been submitted,
10 logins and passwords have been submitted or instructions to
11 get those. And counsel on the phone I think should be
12 advised that they will be due December 26th for any case
13 that had been filed prior to September 27th, and then just
14 follow the pretrial order for other deadlines going forward.

15 THE COURT: In view of the fact that you were
16 primarily saying that for the benefit of the folks on the
17 phone, could someone on the phone unmute and just confirm
18 that you were able to hear that?

19 MS. THAYER: Wendy Thayer here. Yes, we heard
20 that.

21 THE COURT: Okay, thanks very much.

22 MS. ZIMMERMAN: And if anyone has any questions,
23 the Pritzker firm here in Minneapolis has been helping to
24 handle the logins.

25 THE COURT: Excellent. You all got my order on

1 the bellwether?

2 MS. ZIMMERMAN: Yes, Your Honor.

3 MR. BLACKWELL: Yes, Your Honor. Could I?

4 THE COURT: My view was that someone had to make a
5 decision, so I thought it might as well be me.

6 MR. BLACKWELL: Could I just raise just a small
7 matter with respect to it?

8 THE COURT: Okay.

9 MR. BLACKWELL: And I'm glad to see Judge Leary
10 here too. Good morning, Your Honor. This relates to
11 coordination with respect to the Ramsey County cases that
12 ought to be included. It might require a little
13 coordination. The plaintiff's leadership committee in the
14 Ramsey County State Court case is not the same as the
15 leadership here, and so there may be a bit of coordination
16 between them with respect to picking the bellwether.

17 And the second item relates to the plaintiff's
18 fact sheets. Presently there's not an order in Ramsey
19 County with respect to creating those. And that would be
20 another coordination matter that perhaps Judge Leary could
21 work with Your Honors with respect to that to coordinate
22 between the two courts.

23 JUDGE LEARY: Can I ask, Ms. Zimmerman, are you
24 part of that group?

25 MS. ZIMMERMAN: Yes, Your Honor, and I can

1 represent to all of the judges here that there is actually a
2 resolution about leadership in Ramsey County, and I have
3 been tasked as the liaison or lead counsel for Ramsey County
4 cases. So we're happy to use the same fact sheet if that
5 would facilitate things. I think that probably makes a lot
6 of sense. There's no reason to do something different.
7 There isn't an order yet in Ramsey County that those be
8 submitted on the same time frame, but we can do that.

9 MR. BLACKWELL: Right, and my comment was more
10 just major housekeeping that Ms. Zimmerman is the liasion as
11 you say, but the rest of the group is not necessarily the
12 same from the plaintiff's leadership group. I understand
13 there were one or two other firms in Ramsey.

14 MS. ZIMMERMAN: Initially, there were a couple of
15 other firms, and there was an interim group of lead counsel
16 of four firms. At least one of those firms has dismissed
17 the Ramsey County cases and refiled for the part of the MDL.
18 And as I understand it, the other two firms are happy to
19 follow the will of the Court.

20 JUDGE LEARY: I would request, Mr. Blackwell and
21 Ms. Zimmerman, if you feel that there are orders that need
22 issue out of Ramsey County, then speak with each other,
23 submit a proposed order in that regard, and I'll take a look
24 at it.

25 MR. BLACKWELL: Yes, we'll do that. We just

1 wanted to make sure it was consonant in Ramsey Court and
2 Federal Court here, so.

3 THE COURT: Let me explain some of the reasoning
4 behind the way my order separated out the MDLs from the
5 Ramsey County cases for the initial random selection that I
6 will do.

7 In order to -- well, we had discussed making the
8 Ramsey County cases part of the bellwether pool, and
9 statistically it wouldn't work. There just wouldn't be
10 enough chance. If we have roughly 50 cases in Ramsey County
11 and roughly a thousand cases here, if we just put them in
12 that big pool, they wouldn't -- you wouldn't necessarily get
13 what you want. You know, and you really want some
14 bellwether cases possibly in Ramsey County, so that you can
15 see how they go. So that's the only reason that they're
16 separated out.

17 And with that as background, and with what Judge
18 Leary has said, and the fact that, Ms. Zimmerman, you're in
19 both of the leadership positions, it seems that any issues
20 there should be able to be worked out on the housekeeping
21 end of things.

22 MS. ZIMMERMAN: Absolutely.

23 THE COURT: Okay.

24 MR. BLACKWELL: Thank you, Your Honor.

25 THE COURT: Yes, thanks very much. And speaking

1 of numbers, that's the next item on our agenda. So 892?

2 MS. YOUNG: Your Honor, this was as of Friday.

3 THE COURT: Hold on, hold on. I skipped a page.
4 It's because that was a Freudian skip. Judge Noel, do you
5 want to take this one?

6 MAGISTRATE JUDGE NOEL: So this is the foreign
7 discovery that is the followup to what happened in the UK.
8 Who wants to, Ms. Ahmann?

9 MS. AHMANN: Yes. Thank you, Your Honors. As an
10 update, we have reached an agreement with one of the authors
11 McGovern who will appear voluntarily and a consent order has
12 been entered, and his deposition has been confirmed with the
13 date of December 9th, and plaintiffs have been advised of
14 that.

15 As to the remaining study authors, there was a
16 hearing in the High Court, and the Court did issue an order
17 ordering those witnesses. There's four of them to appear,
18 and we're working on dates with regard to those four. And I
19 have been in communication with the plaintiff that there's
20 tentative dates that I just found out this morning are still
21 in limbo, but we're trying to get those firmed up for two of
22 them. But the plan is to have the depositions take place
23 from a period of November 30th to December 8th, and there
24 will be the four authors sometime in that period.

25 THE COURT: Let me ask this question as I read the

1 joint report. You indicate that the High Court in London
2 ordered that the testimony be limited to facts and not
3 include expert testimony. I thought all these folks had
4 were expert opinions. What do they know about facts?

5 MS. AHMANN: Well, and that is the whole issue.
6 We want to know the facts about the studies, so we're not
7 going to be asking them opinion questions about the studies.
8 We're going to be asking questions about how the studies
9 were, you know, what the protocols were, how they were
10 carried out, and we laid that out to the High Court because
11 the Court was concerned particularly in the UK about it
12 being expert discovery, which they wouldn't have allowed, so
13 that was part of the argument to the High Court. And so
14 they are facts. It really relates to how the studies were
15 done, what the numbers were rather than, quite frankly,
16 opinions based upon those numbers.

17 MAGISTRATE JUDGE NOEL: So a question arises
18 regarding, first of all, I'm not sure I understand what
19 concerns a London court has about expert testimony. Is that
20 not a thing in England?

21 MS. AHMANN: That's exactly right. There is case
22 law there, particularly with regard to foreign matters, so
23 there is case law there, which did not allow expert
24 discovery based -- expert opinions, so that was something we
25 had to tell the Court that that's not what we were after.

1 (Unidentified telephone speaker heard).

2 MS. AHMANN: Somebody needs to mute.

3 MAGISTRATE JUDGE NOEL: So then how are they
4 defining experts? As I understand it, these studies are
5 scientific studies these authors did and offered opinions
6 about what this data shows. They can't testify to their own
7 opinions about their own studies? Or just they can't
8 testify about how this might relate to claims in this case
9 or these multi-district cases?

10 MS. AHMANN: Right, I think they can't extrapolate
11 out and that's not necessarily what we're asking them to do.
12 We're asking them about their studies and what the protocols
13 were and what the findings were, but that doesn't mean
14 that's expert. So we're not going to ask them to
15 extrapolate out.

16 THE COURT: That's -- I'm happy to go to England
17 and straighten them out. But so my understanding of the
18 expert -- well, here's how I imagine that the UK Court is
19 defining an expert. It would be a person who is giving an
20 expert opinion on the result that should be reached in the
21 case at issue. So the depositions could fully explore what
22 those witnesses did in their own study, and you wouldn't
23 have -- you wouldn't have objections if there was something
24 that sounded like an opinion as long as it was talking just
25 about their own study. But it's where it strays over into

1 what we now allow in the United States as to the opinion on
2 the ultimate issue.

3 MS. AHMANN: That is my understanding. And they
4 have, they call them examiners, so there will be an examiner
5 there to make sure, you know, that things are done according
6 to what would be allowed in the UK, so.

7 THE COURT: Do you have any choice about the
8 examiner? Is that someone appointed by the Court?

9 MS. AHMANN: No, you hire the examiner.

10 MAGISTRATE JUDGE NOEL: And is the examiner a
11 lawyer, a solicitor or a barrister or just a scientific
12 person?

13 MS. AHMANN: No, I think it's a barrister as
14 opposed to a solicitor. Any other questions on the form?
15 Thank you.

16 Do the plaintiffs have any observations on it
17 regarding the foreign depositions?

18 MS. ZIMMERMAN: Yes, Your Honor.

19 MAGISTRATE JUDGE NOEL: Ms. Zimmerman?

20 MS. ZIMMERMAN: So it is our understanding, and we
21 have very much taken a back seat approach to the depositions
22 in the UK and let the defendants kind of push forward on
23 that issue.

24 It is our understanding that these are not
25 discovery depositions either, so the process on what exactly

1 we're going to be learning here I think is something we have
2 yet to figure out. So these are supposedly, as we
3 understand it, trial depositions, and they're going to be
4 limited, I gather, to the facts and the methods and the
5 conclusions reached in the particular studies that have been
6 identified. But I think that there are some limitations on
7 what kind of questions can even be asked of these witnesses
8 about their studies, at least that's my understanding.

9 MS. AHMANN: Yes.

10 MAGISTRATE JUDGE NOEL: But the plaintiffs intend
11 or it's the plaintiffs plan to have lawyers present for
12 these depositions.

13 MS. ZIMMERMAN: Absolutely, Your Honor.

14 MAGISTRATE JUDGE NOEL: And will you be asking
15 questions?

16 MS. ZIMMERMAN: Yes, we well.

17 MAGISTRATE JUDGE NOEL: Okay.

18 MS. ZIMMERMAN: And pursuant to the High Court's
19 order, we all had to identify the documents that we would
20 question the witness about as of yesterday. I think that
21 they need the documents 14 days before any depositions go
22 forward.

23 MAGISTRATE JUDGE NOEL: Okay.

1 MS. ZIMMERMAN: One additional matter, we learned
2 during the deposition of Mr. Van Duren I think in the last
3 week or so, that the research of Mr. Harper, and he was the
4 subject of the voluntary cancelled deposition back in
5 September, we learned that he was and is actually on the 3M
6 advisory board, so the plaintiffs are investigating our
7 options with respect to rescheduling that deposition while
8 we are in the UK.

9 MAGISTRATE JUDGE NOEL: I had one other question
10 actually for -- I'm sorry, were you done, Ms. Zimmerman?

11 MS. ZIMMERMAN: Yes, Your Honor.

12 MAGISTRATE JUDGE NOEL: There was -- hold on one
13 second. Never mind, it relates to a different matter.
14 Scratch that.

15 JUDGE LEARY: May I ask a couple of questions?

16 THE COURT: Judge Leary, would you come up here so
17 that the people on the phone are able to hear you?

18 JUDGE LEARY: I'm still a little bit confused
19 about the parameters of these foreign depositions. And if
20 you're going to go to England to take them, I think as far
21 as I'm concerned, I would want to have a clear understanding
22 of whether that's going to be productive. And it seems to
23 me from what I've heard so far is nobody is really certain
24 what can be asked or what will be allowed to be answered.
25 So my question is this, I'm going to call them authors

1 instead of experts, with regard to the authors of these
2 articles, let's assume an author reaches four conclusions.
3 Will you be allowed to ask with regard to conclusion one
4 what were the facts you relied upon in coming to this
5 conclusion? Can that be asked?

6 MS. AHMANN: Oh, I would believe that's a fact.
7 Yes, that's a fact question, Your Honor.

8 JUDGE LEARY: Okay. So when you're talking about
9 extrapolation, you're talking about taking information from
10 the author's article and then applying it more directly or
11 directly or indirectly to the litigation here, correct?

12 MS. AHMANN: Yeah, I think we're allowed to ask
13 questions about the study, how it was conducted, what the
14 findings were, but.

15 JUDGE LEARY: Okay, but you can ask questions
16 about the nexus between the conclusions and the study and
17 the other information they might have relied on?

18 MS. AHMANN: I believe so. I mean I have to say
19 that I'm not, you know, I didn't do the argument before the
20 High Court, but we did an argument and submitted information
21 to show them that this is what we were -- this is what we
22 were asking about and that it wasn't expert testimony and
23 the Court was satisfied.

24 We submitted questions. We submitted requests for
25 documents which by and large they rejected, but we submitted

1 questions, and for the most part, or topics, those were
2 allowed by the High Court.

3 And so there is an idea I mean where exactly that
4 boundary is going to be, I can't tell you, and I don't quite
5 frankly know if anybody can tell you. But the questions and
6 the general topic areas were something that the High Court
7 had at the time of the hearing.

8 JUDGE LEARY: Well, I'll just make this
9 observation. It does seem to me to be worthwhile if either
10 sides of this litigation can get together and reach some
11 sort of agreement as to the parameters in which they
12 understand the depositions of these authors will be taken,
13 and maybe in advance submit it to the examiner. And so you
14 know before you go across the ocean where you are rather
15 than, I mean at this point in time my impression is you
16 don't know where you are, in terms of what you'll be able to
17 allow to ask these authors.

18 MS. AHMANN: Well, I mean I agree with you, and we
19 will. We'll make that effort to talk with the plaintiffs
20 but --

21 MR. BLACKWELL: It might be helpful to Your Honors
22 if after this hearing today we gave Your Honor a copy of the
23 High Court's order that does spell out what we can and can't
24 go into in the deposition in some detail.

25 JUDGE LEARY: Well, yeah, again, I'll make my own

1 observation. Those individuals who are going to -- those
2 authors who are going to be presented are subject to the
3 laws of England. They're not subject -- we don't -- my
4 court, District Court, Federal District Court doesn't have
5 any jurisdiction over them. So you can send that to us, but
6 that still doesn't necessarily solve the problem in terms of
7 what are the parameters of what you can ask? So you can
8 send the opinion of the High Court as to this, that, or the
9 other thing, but I don't feel I'm in a position to say, you
10 know, based on this order, you can ask this, that or the
11 other thing. I think you need to talk between yourselves,
12 either sides of the party, to try to reach an understanding
13 as to what you think the parameters of that opinion are and
14 then try to clarify it.

15 MR. BLACKWELL: Even after we have agreed with
16 respect to that, there's an examiner there that still ends
17 up in front of the High Court in London, which will
18 ultimately be at least the arbiter in the UK about what we
19 can and can't do, but we've got plenty of ground to cover
20 with these studies in terms of what they did, who was
21 involved, what were the considerations, what things weren't
22 considered, how did you reach the findings you reached in
23 your study, which is ground central for us, you know.

24 JUDGE LEARY: And you're saying that the order out
25 of England allows you to ask those questions.

1 MR. BLACKWELL: Yes, that kind of factual
2 exploration, yes.

3 JUDGE LEARY: Okay, good, thank you.

4 MAGISTRATE JUDGE NOEL: Anything else with respect
5 to the foreign discovery?

6 MR. BLACKWELL: No, Your Honor.

7 MS. ZIMMERMAN: One last thing, I think the
8 plaintiffs want to make clear that we are reserving all of
9 our rights and arguments with respect to the admissibility
10 and use of these depositions down the road.

11 MAGISTRATE JUDGE NOEL: Let me ask this, which
12 actually Judge Ericksen raised is are these authors that
13 we're talking about are the folks whose studies came up
14 during science day? Some of them?

15 MR. BLACKWELL: Yes, Your Honor.

16 MS. ZIMMERMAN: Some of them. The plaintiffs
17 didn't use any of these studies during science day.

18 MAGISTRATE JUDGE NOEL: That's my question, I
19 guess. So these folks, these studies are or are not studies
20 that your testifying experts at trial are going to be
21 relying upon?

22 MS. ZIMMERMAN: You know, at this point, I don't
23 know what they will rely on. I mean we have --

24 MR. BLACKWELL: Your Honor, I hope they rely on
25 them because they're in the Plaintiff's Complaint, and so

1 these would be the studies that they have cited in their
2 long form Complaint that support their theories that the
3 Bair Hugger causes surgical site infection, so we wanted to
4 get to these study authors. There weren't a whole lot of
5 studies discussed by the plaintiffs on science day. I think
6 there maybe was one. But these studies are in their
7 Complaint, and these are authors of the studies they were
8 relying on in the Complaint, so we wanted to get to the
9 foundation for the opinions that they espoused in their
10 studies.

11 MAGISTRATE JUDGE NOEL: Okay.

12 MS. ZIMMERMAN: It is our expectation that they
13 will certainly be studies that the experts will have
14 considered, and they've come up in the number of the
15 depositions that have been taken thus far. But, I think
16 that this case is a case that we're building on science that
17 we're going to disagree about as we go forward. But the
18 experts that we're going to bring into court are going to
19 have additional testing that they've done, and they will be
20 looking at these including these peer reviewed studies that
21 Mr. Blackwell references and that these depositions are
22 scheduled to explore in some way. But they are all peer
23 reviewed studies as well. So the fact that the plaintiffs
24 and defense attorneys are going to come in and do another
25 review of the studies, I guess is what we think we can do.

1 MAGISTRATE JUDGE NOEL: Okay. Was there something
2 one of your colleagues wanted to?

3 MS. CONLIN: No, I was just going to say that, you
4 know, there is a belief that these studies may be relied on
5 by some of the experts on both sides. My expectation is
6 that 3M's experts are going to say these studies aren't what
7 they say they are, and I think that's the factual
8 exploration that they're going after in the UK.

9 MAGISTRATE JUDGE NOEL: Okay, thank you. That
10 does bring us then to the numbers that Judge Ericksen was
11 going to inquire about. Who has that information?

12 MR. OSTERHOLM: Your Honor, we actually have an
13 updated number. There are currently 916 cases filed into
14 the MDL.

15 THE COURT: I thought we were closer to a
16 thousand. And did you want to stay here for the state cases
17 too? Overview of related State Court proceedings?

18 MR. OSTERHOLM: My colleague Ms. Zimmerman may be
19 in a better position to answer that.

20 MS. ZIMMERMAN: I don't think that there are any
21 updates other than what is reflected in the joint report,
22 but we're happy to talk to the Court about that. I believe
23 that there are still 47 or 50 odd cases assigned to Judge
24 Leary, and then the other cases that are in different
25 jurisdictions in Illinois, Texas. There's a new case in

1 Montana, and then Iowa and Canada.

2 THE COURT: I thought that a few minutes ago I
3 heard that some of the Ramsey County cases were dismissed
4 and filed as part of the MDL, so wouldn't that change the
5 number?

6 MS. ZIMMERMAN: It happened months and months ago,
7 so this number, I think, is accurate.

8 MS. YOUNG: Good morning, Your Honor. Just a
9 brief update on the Iowa State Court case. That has been
10 removed to Federal Court and will be tagged to the MDL
11 shortly. And then we had done a review of the docket
12 recently and noticed there are a number of dismissals. I
13 think five without prejudice, and one with prejudice. And
14 we aren't getting notice of all of those because we haven't
15 appeared in every individual case, and so I would ask that
16 either plaintiff's liaison counsel or someone do give us
17 service copies of stipulations for dismissal going forward.

18 THE COURT: Did we not send you a list of all the
19 cases back when we were trying to clean up the docket?

20 MS. YOUNG: I don't believe so.

21 THE COURT: All right. So plaintiff's liaison
22 counsel will make sure that you're informed on all of those?

23 MR. OSTERHOLM: Yes, yes, we can go ahead and do
24 that.

25 MAGISTRATE JUDGE NOEL: Those dismissals though

1 are not settlements. Those are dismissals because some
2 discovery was made during the course of the thing that there
3 is no case.

4 MS. YOUNG: We were asked to sign one stipulation
5 for dismissal with prejudice but don't have any
6 understanding as to the basis for any of the dismissals.

7 MAGISTRATE JUDGE NOEL: Okay.

8 THE COURT: Thank you. Nothing new in Canada.

9 MS. YOUNG: No, Your Honors, the only update on
10 Canada is that the plaintiff's counsel there has asked for a
11 case status conference, and we expect that would happen in
12 the early part of 2017.

13 MR. HULSE: Your Honors, could I say a quick
14 statement on the *Lawson* case in Texas?

15 THE COURT: Yes.

16 MR. HULSE: Just some learnings we're having from
17 the *Lawson* case, which is a case where there is also a med
18 mal claim against the doctor and the hospital.

19 THE COURT: Did you say "learnings?"

20 MR. HULSE: "Learnings," yeah, I think that that
21 will be useful. In that case there's been a real struggle
22 with product identification, and our conclusion from this is
23 that this is going to be a persistent issue in these cases
24 where the medical records don't include a clear
25 identification of a Bair Hugger. And so what we're getting

1 into is --

2 THE COURT: Could I just interrupt you right
3 there?

4 MR. HULSE: Yes, sure.

5 THE COURT: Are you saying something different
6 from what plaintiff's counsel has mentioned in connection
7 with some of the discovery disputes that it's the brand or
8 the model of Bair Hugger? Or are you saying --

9 MR. HULSE: Whether a Bair Hugger warming unit was
10 actually used at all in a surgery. And so I just want to
11 highlight this as something that through the bellwether
12 process that we're likely, if the Lawson case, which is the
13 only case that's sort of proceeding through the medical
14 records part of the case right now is an indication of
15 something that we're all going have to grapple with as part
16 of that discovery that we do on the bellwether cases. So
17 it's --

18 MAGISTRATE JUDGE NOEL: Is it an issue of whether
19 there was a warming device used or whether the warming
20 device that was used was made by 3M subsidiaries.

21 MR. HULSE: The latter, Your Honor, exactly.
22 That's right, and what we found --

23 MAGISTRATE JUDGE NOEL: How many other makers out
24 there are they that are making warming devices? Forced air
25 warming devices?

1 MR. HULSE: Several others like Stryker.
2 Augustine, of course, has a warming device. And warming is
3 not always used too. And, of course, the patient themselves
4 they're out at the time, and so they don't have a
5 recollection, and then medical records can be, as we found,
6 have been conflicting in terms of what warming is used.

7 There's also pre-operative warming that's often
8 used, and a 3M device, the Bair Paws device is often used in
9 pre-warming. That's a blower that connects to a gown and
10 that can cause confusion in the -- in the sort of the
11 determination that this is a Bair Hugger case. It may be
12 that there's a mistake like there appeared to be in this
13 case about what the 3M, at what stage a 3M device was used.
14 Basically, you've got an indication that a 3M device was
15 used pre-operatively, and then unclear records about whether
16 a 3M device was used operatively.

17 THE COURT: Or post-operatively to warm up the
18 surgeon who was cold from operating in a cold room.

19 MR. HULSE: Absolutely. You have the potential
20 for 3M products warming at all three stages: Pre, intra and
21 post. And so, again, I just wanted to raise it with Your
22 Honors, Judge Leary, it's an issue that we are likely to
23 contend with in cases going forward.

24 MAGISTRATE JUDGE NOEL: So is the defendant
25 developing some strategy or plan to sort of figure out a way

1 to address that more broadly in all the cases in an
2 efficient, targeted way? Or are you just sort of taking it
3 see how it goes?

4 MR. HULSE: Our conclusion is the only real way to
5 address it is with through discovery of the medical
6 providers. And it will in some cases like the Lawson case
7 require depositions of like nurses, and so forth. But
8 there's no way based on our records, I mean all we can know
9 is whether there is a Bair Hugger device, warming air
10 devices at the hospital, but that doesn't necessarily mean
11 that it was used and that there aren't other companies'
12 devices.

13 And so that's as far as we can take it from that
14 point forward. It involves, it's going to require discovery
15 of medical records and potentially depositions, to the
16 extent that the medical records don't tell you, depositions
17 of the nurses who are on staff at the time to say, yes, a
18 Bair Hugger was actually used during that surgery.

19 MAGISTRATE JUDGE NOEL: Wasn't this the topic of a
20 prior discovery conference regarding the plaintiffs wanting
21 to get your list of what hospitals had your which models?

22 MR. HULSE: It was related to that, Your Honor,
23 but part of the point that we made is you cannot draw that
24 conclusion just from the fact that there may have been a
25 Bair Hugger assigned to that, that went to that hospital.

1 MAGISTRATE JUDGE NOEL: Are the plaintiffs'
2 lawyers in Lawson represented anywhere in our leadership
3 team here or no?

4 MR. HULSE: No.

5 MS. ZIMMERMAN: No, Your Honor.

6 MAGISTRATE JUDGE NOEL: Okay, thank you.

7 MR. HULSE: Thanks, Your Honors.

8 MAGISTRATE JUDGE NOEL Ms. Zimmerman, did you want
9 to say anything on these issues.

10 MS. ZIMMERMAN: Just that we are not experiencing
11 that as a difficulty. I mean it can be problematic, and
12 there is a lot of variation from medical records from one
13 hospital to another. But there are some records where it
14 will actually say, they'll have a little logo Bair Hugger
15 with the little bear on it, and the nurse or whoever checks
16 it off.

17 We can find it in billing reports. I mean there
18 are actually reports that we find now. We don't have the
19 serial number for the actual heating unit most of the time,
20 and I believe that that's going to be information that's
21 going to be in the custody of the defendants. But at least
22 we are not seeing that this is an issue with respect to the
23 filings in either Ramsey County or the MDL. And I do know
24 that defendants have submitted letters to various attorneys
25 who have filed cases where I assume based on a customer list

1 or something, the defendants are of a belief that there was
2 no Bair Hugger in that particular hospital.

3 So I think that if there was a sense by the
4 defendants that a majority or a large number of cases either
5 in Ramsey County or before this Court, we're involving
6 hospitals that didn't have Bair Huggers, I suspect we would
7 be getting a lot of these letters because I've seen the
8 letters that do go out.

9 THE COURT: What are the other companies that make
10 forced air?

11 MS. ZIMMERMAN: There are a few. There's a
12 company called Smiths Medical, I believe. There is another
13 Stryker has a smaller market share, but they have another
14 product that is forced air warming. But to my
15 understanding, forced air warming made by 3M and the Arizant
16 Company, the Bair Hugger, is over 90 percent of the market
17 share.

18 THE COURT: Okay.

19 MR. BLACKWELL: And Augustine makes the HotDog
20 that's in some hospitals.

21 THE COURT: No, no, it was just I didn't realize
22 that there were other companies that made also the forced
23 air warming blanket. So do you know when there's a form
24 with a picture of a little bear for the nurse to check, is
25 it like kleenex? You know, maybe there's Puffs or

1 something, and do they --

2 MS. ZIMMERMAN: That could be.

3 THE COURT: Who knows, yeah, but I guess you'll
4 find out.

5 MS. CONLIN: Actually, Your Honor, most hospitals
6 are single source suppliers. In other words, that once
7 you're in at a hospital, they're not choosing amongst
8 various models.

9 THE COURT: That makes sense.

10 MS. CONLIN: And, you know, some of these other
11 companies have -- they don't have, they may have products on
12 the market, but they're not necessarily forced air warming.

13 THE COURT: Okay.

14 MR. BLACKWELL: And our point really is a straight
15 forward one that if we're going to pick a bellwether case
16 where the claim is that the Bair Hugger causes SSIs when
17 used during surgeries, we want to make sure we've got
18 positive ID that there's a Bair Hugger being used in the
19 surgery. And there is some fuzziness, as the Lawson case
20 indicates, that that may not be the case simply because it's
21 in a pleading or the Bair Huggers were at a hospital,
22 generally.

23 MS. ZIMMERMAN: I suspect we'll take that up at
24 the appropriate time down the road.

25 THE COURT: If you find out before December 28th

1 that some cases shouldn't be in the pool, let me know, would
2 you?

3 MS. ZIMMERMAN: Absolutely. And to the extent
4 that the Court is interested, there are other warming
5 products that are not forced air like the Augustine product
6 and other kind of --

7 THE COURT: I know that. I just, when one of you
8 lawyers said that there are other forced air warming things,
9 that was, I perhaps should have known that. I just was not
10 aware of that. I didn't remember that from science day.

11 Number 5 then, additional pretrial orders, nothing
12 there. Discovery, you'll be -- well, let's, Ms. Zimmerman?

13 MS. ZIMMERMAN: Thank you, Your Honor.

14 Starting out with number 6, the status of
15 discovery, we in the joint report reflected the fact that
16 there have been some ongoing issues with respect to the
17 privilege log. It is our expectation that that issue will
18 likely come to a head in time for the status conference in
19 December, so that's my expectation at this point.

20 With respect to the Computer Assisted Review, the
21 CAR protocol, which was stipulated to and entered by this
22 Court, the plaintiffs request that the Court be made aware
23 of the fact that we still don't have any of these documents.
24 This hasn't been done, hasn't been, none of the car protocol
25 has been implemented, so we are getting some e-mails but the

1 actual agreed upon process to identify the electronically
2 stored information has not yet commenced, and we have even
3 as of this morning no date by which these are going to be
4 completed.

5 And so what I'd like to do, you know, we've had
6 Mr. Ciresi has taken a couple of deposition in the last few
7 weeks, as has Ms. Conlin. We have left these depositions
8 open pending review of the documents that are going to be
9 produced pursuant to the CAR protocol. But we're at this
10 point I think 63 days away from the close of general
11 causation discovery. And so I'd like to have my colleague
12 Mr. Parekh come up to talk a little bit more in detail about
13 the specifics of what we have and where we're at. But given
14 the deadlines in this case, we really request that there be
15 a deadline by which these CAR protocol documents be
16 produced.

17 MAGISTRATE JUDGE NOEL: So whose more appropriate
18 to respond to this question, you or your colleague? And the
19 question is what's your response to my understanding from
20 reading this statement the defendants contend some of that
21 delay is caused by the collaborative process that the
22 protocol calls for, and that the plaintiffs have some
23 responsibility for the delay?

24 MS. ZIMMERMAN: I think that Mr. Parekh is
25 prepared to handle this as well.

1 MR. PAREKH: So, just to clarify a little bit, the
2 CAR protocol does call for a collaborative effort, and we're
3 in the process of that collaborative effort, so there is
4 parts of it that are going forward. The initial process was
5 that there would be an identification of random documents.
6 The plaintiffs would get to review those documents and turn
7 those around back to the defendants within 14 days, which we
8 did.

9 The part of the delay on the CAR protocol actually
10 stems from much further back in time, which is when we had
11 the dispute over the custodian issue, defendants
12 unilaterally stopped this process and that led to weeks of
13 delay where nothing happened over protests by plaintiffs
14 that we should continue with that process even with that
15 dispute outstanding.

16 At this point, we've finished step one, I believe,
17 I think, as of today, which is the initial seed set of
18 documents, and then the next step is that we need to do some
19 iterations to hit the 80 percent, sort of the satisfaction
20 level that we've all agreed to.

21 The issue is the turnaround time on some of these
22 things has been taking a significant amount of time from
23 defendant's side. I mean we've tried to turn things around
24 as fast as possible from the plaintiffs' side, and we have.
25 But, I mean just as one example, you know, we sent a list of

1 documents that we said from a log that we thought should be
2 included as relevant documents when defendants had
3 identified them as irrelevant documents. It took
4 approximately two weeks for us to get a copy of those
5 documents back to us so that we could actually review them,
6 and then we turned those around in, I believe, four days at
7 this point. They came in on Friday, and we turned them
8 around.

9 So it's just, it's taking longer than we believe
10 it should, but I think having a deadline by which all of
11 these documents must be produced would be helpful in terms
12 of spurring the process along. Deadlines make people work
13 harder and work more efficiently, and so that's what we were
14 asking for.

15 MAGISTRATE JUDGE NOEL: And do you have a proposed
16 deadline in mind that you would suggest?

17 MR. PAREKH: We think having discovery completed
18 by the December 15th conference would be -- I think would
19 allow us enough time between now and then to get everything
20 done.

21 MAGISTRATE JUDGE NOEL: Okay. Mr. Hulse?

22 MR. PAREKH: The documents received by plaintiffs.

23 MR. HULSE: Your Honors, the plaintiffs here
24 insisted on a collaborative process. The process that we
25 agreed to bakes in multiple two week iterations for them to

1 review and challenge each stage that we run at in order to
2 achieve 80 percent.

3 I agree, we haven't always moved as fast as we
4 could. You've seen our position that we think the majority
5 of this owes to the plaintiffs. We have produced a very,
6 very substantial amount of e-mail both between the prior CAR
7 process that was done for the prior litigation, but much
8 more so through key word searches that we've agreed upon
9 with plaintiffs. And our belief is that much of what is
10 going to be produced out of this process is, just to put a
11 word on it, going to be "junk" because we have agreed on for
12 this purpose extremely broad relevance criteria that's going
13 to generate a lot of stuff that just relates to Bair Hugger
14 in some sense.

15 That said, I think the plaintiffs know, and Mr.
16 Parekh knows that finishing this process by a date in
17 December given these 14 day challenge procedures that
18 they've requested and they got here is not realistic. We
19 all have a discovery cut-off right now at the end of January
20 that we have to abide by, obviously, but arbitrarily moving
21 that up is simply not realistic.

22 Now, before we came in here today, Mr. Parekh and
23 I, Mr. Parekh made clear to me the position he was going to
24 express, but we did have a very productive discussion about
25 things we could do, agreements that we could reach to

1 streamline this protocol that we agreed to to move through
2 the remainder of the process far more quickly than the
3 protocol would provide.

4 If we are able to implement that, finish our
5 discussion and implement it, my suggestion would be that we
6 come back, Your Honors, within two weeks when we have
7 significantly moved now the -- now that we've got the
8 training set agreed, move the rest of the process forward.
9 And if the plaintiffs are dissatisfied at that point with
10 the progress of things, then absolutely they should take it
11 up with Your Honors about whether something additional needs
12 to be ordered.

13 But I don't think that is what they're asking for
14 today, at least in front of the Court in terms of deadline
15 is realistic or can be accomplished under the existing
16 protocol. And the only way we would have a prayer of doing
17 that is rescinding the protocol to eliminate the
18 collaborative portions of it.

19 MAGISTRATE JUDGE NOEL: If the Court were inclined
20 to impose a deadline, and I don't know whether it is or
21 isn't, but if it were, what deadline would you suggest the
22 Court impose?

23 MR. HULSE: Simply the discovery close date.
24 Obviously, if the plaintiffs conclusion that there was
25 something that was material to them that they needed before

1 a deposition they took, I assume that they will as they've
2 said raise that with the Court. But as in any large scale
3 litigation, there is going to be ongoing document production
4 through the end of discovery. We have produced nearly all
5 of everything else in addition to the nearly a million pages
6 of e-mail and attachments that we've produced.

7 The plaintiffs have had no problem using e-mail,
8 using plenty of e-mail in the depositions that they've taken
9 so far. And like I said, we believe that it is what has
10 actually been produced is the most important stuff and what
11 much of what is likely to be produced in the remainder of
12 this process is of minimal relevance at best. But, again,
13 it's, I think, it's simply not compatible with the protocol
14 as we have it today to get this process fully completed by a
15 month from now.

16 MAGISTRATE JUDGE NOEL: Okay. Thank you.

17 THE COURT: Mr. Parekh, would you say that you
18 actually made a motion for a December 15th deadline such
19 that it has to be ruled on?

20 MR. PAREKH: Yes, Your Honor, we would make a
21 formal motion.

22 THE COURT: Okay, well, all right. So if there's
23 a motion, the motion is denied because we've got the
24 collaborative process. If somebody is not following it as
25 they're supposed to be following it, let us know in the

1 interim, and we can hopefully have a more -- it would be a
2 more effective way for the Court to intervene rather than
3 what strikes me right now, I mean I feel hard pressed to
4 say, okay, we said discovery ending now. Now this part has
5 to end on December 15th.

6 So I'm not going to order that but, obviously, as
7 you're going through, have in mind everything that you've
8 all talked about today, and come to us in the course of the
9 process. You know if they say they're supposed to get
10 something done in two weeks and they don't get it done, then
11 let us know.

12 MR. PAREKH: Your Honor, our only concern is that
13 when we agreed to the two-week time frame that was months
14 ago and now that we're sort of that the initial process
15 didn't start for about three months, that the protocol was
16 entered.

17 THE COURT: Well, when, stage 1 of the iterative
18 process often takes the longest, so you're there, and I
19 would prefer to see how things go from here on rather than
20 jump in right now with a sledgehammer.

21 MR. PAREKH: I understand, Your Honor. Thank you.

22 THE COURT: Other discovery issues? You will be
23 meeting? Meeting and conferring. Okay, so you'll be at
24 1:00, would you like to be in Judge Noel's courtroom? Is
25 that what you're planning?

1 MS. ZIMMERMAN: Wherever the Court would prefer.

2 THE COURT: Let's say Judge Noel's courtroom.

3 Okay. Deposition update.

4 MS. ZIMMERMAN: There is one additional issue with
5 respect to the depositions, and this arises out of the
6 deposition of Mark Albrecht, which was done in two parts.
7 The second part concluded on Saturday afternoon. The
8 defendants used the full seven hours, and the witness
9 declined to continue to offer testimony. Mr. Gordon, Corey
10 Gordon suggested that he may be bringing a motion to the
11 Court to require or seek an order to have Mr. Albrecht
12 appear for additional deposition. I think he said he has a
13 couple additional hours.

14 The plaintiffs, additionally, and I don't know if
15 that is a motion you intend to bring or not, but the
16 plaintiffs have not yet had an opportunity to question
17 Mr. Albrecht at all.

18 MAGISTRATE JUDGE NOEL: I'm sorry, ten seconds of
19 context, who is Mr. Albrecht?

20 MS. ZIMMERMAN: He is a former employee of the
21 Arizant and Augustine company.

22 MR. BLACKWELL: He's an author of several of the
23 studies that are at issue.

24 THE COURT: He's a U.S. study author.

25 MS. ZIMMERMAN: He is, and he lives here in

1 Minnesota.

2 THE COURT: One more time. You want more hours?

3 MR. BLACKWELL: Yes, Your Honor. And this is,
4 assume Ms. Zimmerman is simply teeing it up today, but we do
5 intend to come to the Court with a specific proposal for how
6 much more time we need, and what we'd like to cover. This
7 is the first deposition we've come upon where our seven
8 hours was up, and we still have other ground yet to cover,
9 and plaintiffs need to ask questions also. He's a very
10 central researcher and witness.

11 MAGISTRATE JUDGE NOEL: Is he represented by
12 counsel?

13 MS. ZIMMERMAN: No, he's not.

14 MAGISTRATE JUDGE NOEL: He just said, "I'm done,"
15 at seven hours because he's read the rule?

16 MR. BLACKWELL: That's correct. He's pretty
17 savvy.

18 THE COURT: Do the plaintiffs intend to take his
19 deposition then separately?

20 MS. ZIMMERMAN: We do expect to notice his
21 deposition. We certainly don't expect we would take seven
22 hours, but we do object to defendants getting more than
23 seven hours for his deposition. And we've taken at this
24 point some of the most key 3M employees, Mr. Ciresi and
25 Ms. Conlin have taken in the last few weeks, in less than

1 seven hours, and we certainly could have gone over seven
2 hours. But the point of the rule is that there is a limited
3 period of time, and we have to focus our time and our
4 attention. And we think that with respect to Mr. Albrecht
5 that the seven hours has come and gone, and we may have some
6 questions if we decide to notice his deposition, but that
7 there is no reason that 3M be allowed additional time with
8 this witness.

9 MR. BLACKWELL: This is my point about jumping the
10 gun on this. We haven't even petitioned the Court to
11 explain why we need to do this yet, yet we want to do it
12 properly and formally. And the plaintiffs have -- we should
13 have a fair opportunity to respond to that, but so the Court
14 can see what we've covered and have some sense of what is
15 yet to be covered, and we'd like to be able to present that
16 to the Court in the proper fashion.

17 THE COURT: All right. We're warned that a motion
18 may be forthcoming. Get ready for it.

19 MR. BLACKWELL: Thank you, Your Honor.

20 THE COURT: Well, unless I've skipped ahead again,
21 I'm on page 10, which is the signature page.

22 All right. Let me ask about the December time,
23 and this has to do with your flight schedules. I'm not sure
24 why we set 10:00. I think I picked that because I thought
25 you needed time to get into town or something. 9, 9:30, 10?

1 MS. ZIMMERMAN: That's fine with the plaintiffs,
2 Your Honor.

3 THE COURT: So if we say, let's say 9:30, but I
4 don't want to just do that if it's going to mean that people
5 have to flight in the night before whereas otherwise they
6 wouldn't.

7 MS. ZIMMERMAN: It's going to be fine, Your Honor.
8 I think anyone who would have to fly in probably has to fly
9 in the night before anyway, and an earlier hearing may
10 actually facilitate departure later in that day.

11 THE COURT: Because originally we had it in the
12 afternoon. So let me just -- all right. Well, let's say
13 9:30. I was looking at the 10:00, and I thought, well,
14 that's an odd time. I wonder how that happened.

15 MR. BLACKWELL: And, Your Honors, I will say I
16 will not be here on December 15th. I have to choose on that
17 date between this Court and my wife. And as she will be in
18 Saint Kitts, I must be with her. So I will not be here.

19 THE COURT: So now you're not even being
20 excessively uxorious.

21 MR. BLACKWELL: Not at all, Your Honor. So I
22 won't be here. My hope is that it won't be necessary, but
23 we'll see.

24 MAGISTRATE JUDGE NOEL: I would just observe you
25 have a table full of qualified colleagues so.

1 THE COURT: There's only one empty chair. That's
2 for the really qualified person.

3 MR. BLACKWELL: Yes, Your Honor. I couldn't agree
4 more, and they also hope it won't be necessary.

5 THE COURT: All right. Thank you all. We're in
6 recess.

7 MAGISTRATE JUDGE NOEL: We'll see you all at 1:00
8 in 9W.

9 (Court adjourned at 11:07 a.m.)

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14 I, Maria V. Weinbeck, certify that the foregoing is
15 a correct transcript from the record of proceedings in the
16 above-entitled matter.

17

18 Certified by: s/ Maria V. Weinbeck

19 Maria V. Weinbeck, RMR-FCRR

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